

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

Petitioner,

V.

UNITED STATES OF AMERICA

Respondent.

First, Mr. Garcia pled guilty, pursuant to a written plea agreement, to one count of Deported Alien Found in the United States, in violation of 8 U.S.C. § 1326(a) and (b). In the written plea

1 agreement, Mr. Garcia explicitly waived his right to appeal and/or collaterally attack his conviction
2 or sentence. The Ninth Circuit has long acknowledged that the terms of a plea agreement are
3 enforceable. *See, United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996), *cert. denied*, 117
4 S.Ct. 1282 (1997). Since Mr. Garcia expressly waived his statutory right to appeal or collaterally
5 attack his sentence in his plea agreement, Mr. Garcia is now precluded from challenging that
6 sentence pursuant to 28 U.S.C. § 2255. *See, United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir.
7 1993) (holding that a knowing and voluntary waiver of a statutory right is enforceable). Notably,
8 in the written plea agreement, Mr. Garcia also agreed to a +16 enhancement for a crime of violence
9 for his prior conviction.

10 Moreover, even if Mr. Garcia had not expressly waived his right to appeal or collaterally
11 attack his sentence, his petition would still fail. In essence, Mr. Garcia argues that his counsel was
12 ineffective for a variety of reasons. In order to prevail on a claim of ineffective assistance of
13 counsel, a petitioner must show that counsel's performance was deficient and that this deficient
14 performance prejudiced the petitioner. *Strickland v. Washington* 466 U.S. 668, 687 (1984). The
15 petitioner must show that but for counsel's errors he would not have pled guilty and would have
16 insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52 (1985). Mr. Garcia has made no showing
17 that he would have gone to trial but for the errors of his counsel. Additionally, in his written plea
18 agreement, Mr. Garcia agreed to the +16 for the crime of violence. His counsel was bound by the
19 plea agreement and could not argue against it before the Court.

20 Mr. Garcia also argues that because of his status as a deportable alien, he is "ineligible[] for
21 pre-release custody and minimum security confinement." Mr. Garcia argues that the Court should
22 grant him a two level downward departure because of his status. However, Mr. Garcia's argument
23 that the Court should depart downward because he is a deportable alien is precluded by statute and
24 current Ninth Circuit case law. By statute, the Court may depart downward only if there are
25 "aggravating or mitigating circumstances . . . not adequately taken into consideration by the
26 Sentencing Commission." 18 U.S.C. § 3553(b). Specifically, the Ninth Circuit has held that the
27 threat of deportation is not a factor that the district court may consider for sentencing purposes.
28 *United States v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990). Accordingly,

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3 **IT IS ORDERED** that Mr. Garcia's Motion to Modify Sentence is **DENIED**.

4 **IT IS SO ORDERED.**


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8-10-11
date

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GORDON THOMPSON, JR.
United States District Judge

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cc: AUSA Bruce Castetter

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